(2005) 02 CAL CK 0055

In the Calcutta High Court

Case No : G.A. No''s. 3 and 124 of 2005, APOT No. 1 of 2005 and W.P. No. 2131 of 2004

Trend Vyappar Ltd. and Another — APPELLANT

Vs

Regional Provident Fund Commissioner II and Others — RESPONDENT

Date of Decision : 08-02-2005

Acts Referred:

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 14B, 8F(3)

Citation : (2005) 2 CHN 495

Hon'ble Judges : Altamas Kabir, Acting C.J.;Asit Kumar Bisi, J

Bench : Division Bench

Advocate : Balai Chandra Ray and Suparna Ray, Saktinath Mukherjee, Shyamal Sarkar, Nadira Patheria and Dipak Jain, for the Appellant; Ashok Das Adhikary and S.C. Prasad, for the Respondent

Judgement

Altamas Kabir, A.C.J.

1. The appellant No. 1 in this appeal is a Company within the meaning of the Companies Act, 1956 and claims to be carrying on business at 24, Netaji Subhas Road, Kolkata - 1. The appellant No. 2 is a Director-shareholder of the appellant No. 1 Company.

2. The respondent No. 6, the Kelvin Jute Company Ltd. is the owner of Kelvin Jute Mill. Having suffered considerable losses which eroded its net worth, the Kelvin Jute Co. Ltd. was unable to make its net worth positive and filed a reference before the Board for Industrial and Financial Reconstruction (BIFR) under the Sick Industrial Companies (Special Provisions) Act, 1985 (SICA) for rehabilitation of the Company.

3. By order dated 8th February, 1988, the Company was declared sick under the aforesaid Act and finally the BIFR by its order dated 8th November, 1985, recommended that the Company should be wound up. The view of the BIFR was also affirmed by the Appellate Authority on 6th May, 1997.

4. Notwithstanding the recommendation made by the BIFR for winding up of the Company, the workers and the respective workers'' unions are said to have approached the appellant No. 1 sometime in the month of August, 1996, with a proposal for reopening of the Mill and to revive the same. It appears that some arrangement was entered into between the appellants and the workers and on the basis of such arrangement the management of the Company reopened the Jute Mill and commenced running the same from the month of September, 1996.

5. Subsequently in 1997, the workers'' unions filed a writ application, being W. P. No. 10551(W) of 1997, Bengal Chatkal Majdoor Union and Anr. v. Board of Industrial and Financial Reconstruction and Ors., in this Court challenging the recommendation made by the BIFR as affirmed by the AAIFR and for various other reliefs. On such application being moved, a learned Judge of this Court by his order dated 20th of May, 1997 stayed the recommendation made for winding up of Kelvin Jute Co. Ltd. By a subsequent order dated 9th June, 1997, the learned Single Judge allowed the appellant No. 1 to run the Jute Mill of the Kelvin Jute Co. Ltd. under the supervision of a Senior Advocate of this Court, Sri Sohanlal Hazra, who was appointed as Special Officer for the said purpose. In terms of the order passed by the learned Single Judge, the Special Officer was to be assisted by a Committee of Management consisting of three representatives of the workers'' unions, one representative of each of the financial institutions and the Bank, one representative of the appellants and one representative of the State Government in its department of Commerce and Industry. The Special Officer was directed to act as Chairman of the said Committee.

6. As will appear from the submissions made on behalf of the respective parties, the Mill began functioning with some amount of normalcy thereafter and the appellants began to supply jute goods to diverse Government organizations including the Directorate of Supplies and Disposals, Calcutta and the Food Corporation of India. As it appears from the materials on record, on 20th of August, 2002, the Recovery Officer, Provident Fund Organisation had demanded payment of Rs. 5,21,09,186/- from the Director General of Supplies and Disposals, Calcutta (DGS&D) and the Food Corporation of India (F.C.I.), Calcutta on the ground of dues payable by M/s. Kelvin Jute Co. Ltd. It is the case of the appellants that the claim of the said authorities to the said amount was not accepted by the appellants on the ground that no sum was due or payable to the provident fund authorities from the appellants after it undertook to run the Jute Mill. It is also the case of the appellants that they informed the authorities concerned regarding the manner in which the Jute Mill was being run by the appellants on the basis of orders passed by this Court and was being supervised by a Committee of Management appointed by the Court, which Committee was headed by a Special Officer, Sri Sohanlal Hazra, Senior Advocate.

7. The appellants thereafter challenged the action taken by the authorities of DGS&D and F.C.I., by filing a writ application, being W.P. No. 2240 of 2002, and by order dated 8th October, 2002, passed in the said writ application this Court

directed that the appellant-Company should not be harassed by the provident fund authorities on account of dues to Kelvin Jute Mill. Thereafter, the matter was also taken up by DGS&D and F.C.I. As far as DGS&D was concerned, on 10th September, 2002, they wrote to the appellants indicating that views had been taken from the Ministry of Law in the matter and it was the opinion of the said Ministry that the appellant No. 1 Company and Kelvin Jute Co. Ltd. were two separate legal entities and that payments due to be made to the appellant No. 1 could not be prevented and/or stopped on account of dues of Kelvin Jute Co. Ltd. The Controller of Accounts was, in fact, requested to release payment to the appellant No. 1. A copy of the said letter has been annexed to the writ petition.

8. On 3rd December, 2003, the writ application filed by the workers'' unions, being W. P. No. 10551(W) of 1997, was finally disposed of by this Court by setting aside the orders passed by the BIFR and AAIFR recommending winding up of Kelvin Jute Co. Ltd. The matter was sent back to the BIFR authorities for reconsidering a revival scheme in respect of the Jute Mill and liberty was given to the parties to file such scheme for revival of the Company before the BIFR authorities. The BIFR was directed to take into consideration the said scheme and this Court further directed that till a final decision was taken by the BIFR, the Jute Mill would continue to be run by the appellant No. 1 and the Committee of Management under the supervision of the Special Officer.

9. We are informed that such scheme has been duly submitted before the BIFR and the same is pending consideration of the said authorities. The management of the Mill is continuing in the manner in which it was being managed, and, in the meantime, a separate writ petition was filed on 24th December, 2003, on behalf of Kelvin Jute Co. Ltd., being W. P. No. 20247 (W) of 2003, with regard to the arrear provident fund dues. On being moved, a learned Single Judge granted an ad interim order of injunction restraining the respondents therein from giving any effect or further effect and/or taking any steps or further steps pursuant to the Memo. Dated 3rd/15th December, 2003, issued by the Recovery Officer for recovery of the arrear provident fund dues. The respondent was also injuncted from resorting to any action in future leading to the forcible recovery of the amount without the leave of the Court. Such interim order was made on condition that Kelvin Jute Co. Ltd. would deposit Rs. 2,00,000/- per month with effect from 1.1.2004 and go on depositing the same along with current dues until further orders.

10. As has been disclosed, there was an interim arrangement between the appellant No. 1 herein and Kelvin Jute Co. Ltd. regarding payment of the said dues, but as far as this matter is concerned, as will appear from the records, the arrear dues are being regularly paid in terms of the aforesaid order while the current dues are being deposited by the appellant No. 1.

11. While the aforesaid situation was continuing, on or about 19.11.04 the appellants received a copy of an order dated 9.11.04 in a proceeding u/s 14B of the Employees'' Provident Fund and Miscellaneous Provisions Act, 1952. From the

said order it was seen that a proceeding for recovery of damages had been initiated against M/s. Kelvin Jute Co. Ltd. for the period from October, 1988 to March, 2003 and a sum of Rs. 24,33,854/- had been levied as damages on M/s. Kelvin Jute Co. Ltd. According to the appellants, no notice of the said proceeding u/s 14B of the 1952 Act had been served on them prior to the passing of the order dated 9.11.04. On receipt of the said order the appellants claimed to have informed the authorities that the said amount was recoverable from M/s. Kelvin Jute Co. Ltd. and not from the appellant/company since they were two separate legal entities. Furthermore, M/s. Kelvin Jute Co. Ltd. was a Sick Industrial Co. within the meaning of the 1985 Act and no payment could be demanded from the said company while a scheme for revival of the company was pending before the BIFR.

12. As will appear from the materials on record, despite the stand taken by the appellants, orders of attachment were issued by the Regional Provident Fund Commissioner-II on 6.12.04 u/s 8F(3)(i) of the 1952 Act attaching the abovementioned sum of Rs. 24,33,854/- lying in the bank account of the appellant No. 1 Company with Citi Bank, Brabourne Road branch, Kolkata. Thereafter, despite letters being sent by the appellant/company to the bank and to the concerned authorities, Citi Bank, Brabourne Road branch, Kolkata, debited the said sum of Rs. 24,33,854/- in the account of the appellant/company and issued a Manager''s cheque in favour of the Provident Fund authorities. The appellant/company challenged the action of the Provident Fund authorities as also that of the bank by way of the writ petition, being W.P. No. 2131 of 2004. On 20.12.04 the writ application was taken up for consideration by the learned Single Judge and after considering the submissions made on behalf of the respective parties and after taking into consideration the fact that the amount in question had already been credited to the account of the Provident Fund authorities, the learned Single Judge was of the view that no interim order could be passed in the matter and observed that even if the amount had been wrongly appropriated by the Provident Fund authorities, the same would abide by the ultimate decision to be taken in the writ application.

13. Aggrieved by the refusal of the learned Single Judge to grant any interim order on the writ application, except for making the aforesaid observation, the appellant/company and its Director Sri Jainendara Kumar Kesliwal, filed the instant appeal and also filed an application for appropriate orders therein. When the application for appropriate orders was taken up on 10.01.05 while giving directions for affidavits this Court made it clear that the amount which had already been appropriated on behalf of the Regional Provident Fund Authorities would be the subject-matter of adjustment against future dues if the writ petitioners/appellants ultimately succeeded in the appeal.

14. Thereafter, an application, being G. A. No. 124 of 2005, was filed on behalf of the appellants for modification and/or clarification in respect of the directions relating to the sums which had been appropriated by the Regional Provident

Fund Authorities from the bank account of the appellant/company in the said bank.

15. While considering the said application, on consent of the parties, the appeal itself was taken up for hearing and disposal having regard to the scope and ambit thereof.

16. Appearing in support of the appeal, Mr. Saktinath Mukherjee, learned Senior Counsel, emphasized the fact that the appellant/company and Kelvin Jute Co. Ltd. were two separate entities having two separate identities and that the appellant/company had no concern with Kelvin Jute Co. Ltd. except for running the Jute Mill in terms of the orders passed by this Court and that too under the supervision of a Committee of Management chaired by a Special Officer appointed by this Court. Mr. Mukherjee submitted that strictly speaking the appellant/company was not even required to pay off the dues of Kelvin Jute Co. Ltd. under the scheme by which the Jute Mill was being managed but that on account of arrangements made, the dues of the Kelvin Jute Co. Ltd. were also being liquidated gradually. Mr. Mukherjee also highlighted the fact that the Kelvin Jute Co. Ltd. had filed a separate writ application with regard to the arrear provident fund dues and in respect whereof interim orders had been made by this Court subject to certain conditions which were being scrupulously followed. According to Mr. Mukherjee, having regard to the said order dated 24.12.03 passed in W. P. No. 20247(W) of 2003 by the learned Single Judge no coercive step could be taken by the Regional Provident Fund Authorities in regard to realisation of its arrear dues.

17. Mr. Mukherjee also pointed out that the monies and the assets of the appellant/company could not be treated to be the assets of Kelvin Jute Co. Ltd. and the amounts assessed as damages in the Section 14B proceeding were damages levied against Kelvin Jute Co. Ltd. for which the funds of the appellant/ company could not be attached and/or appropriated.

18. Mr. Mukherjee contended that when a serious attempt was being made to revive the company, the appropriation of the aforesaid amount by the Regional Provident Fund Authorities would administer a crippling blow to the scheme for revival of the company. In this regard, Mr. Mukherjee also brought to our notice the relevant minutes of the Central Board of Trustees of the Employees'' Provident Fund Organisation which had been forwarded to the Kelvin Jute Co. Ltd. on 05.01.05 and which had been produced by the learned Advocate General, appearing for the Kelvin Jute Co. Ltd. From the said minutes it is evident that notice had been taken of the interim order passed in W.P. No. 20247(W) of 2003 by the learned Single Judge regarding deposit of Rs. 2,00,000/- per month towards the arrear provident fund dues and the fact that a decision had been taken to waive the damages and interest levied u/s 14B of the 1952 Act.

19. Mr. Mukherjee submitted that all the concerned authorities were aware of the fact that the Kelvin Jute Co. Ltd. was on the path to revival and every effort

should be made by the authorities to see that such revival was not hampered in any way. Mr. Mukherjee submitted that although the amount levied as damages had been appropriated by the Regional Provident Fund Authorities from the Citi Bank account of the appellant/company, unless certain orders were made whereby the appellant/company would be in a position to utilise the said amounts, the management of Jute Mill would suffer a severe set back and the scheme as proposed before the BIFR could be rendered meaningless. In this connection, Mr. Mukherjee submitted on instructions that his clients were ready to secure the amount levied as damages by way of bank guarantee notwithstanding the stand taken that the appellant/company was in no way liable for the said damages.

20. The stand taken by Mr. Saktinath Mukherjee was largely supported by the learned Advocate General appearing on behalf of the Kelvin Jute Co. Ltd. The learned Advocate General also emphasized the fact that the Kelvin Jute Co. Ltd. was the undisputed owner of the Mill and was a distinctly separate entity from the appellant No. 1, Trend Vyapaar Ltd. The learned Advocate General reiterated Mr. Mukherjee''s submission with regard to the interim order passed by the learned Single Judge on 24.12.03 in W. P. No. 20247 (W) of 2003 and urged that since the stipulation contained in the said order was being strictly followed, the interim order granted by such order was also subsisting and the Regional Provident Fund Authorities had, in fact, acted in violation of the said order of injunction in attaching and appropriating the damages levied against Kelvin Jute Co. Ltd. in the proceedings u/s 14B of the 1952 Act.

21. On behalf of the Regional Provident Fund Authorities, Mr. Ashok Das Adhikary, learned Senior Counsel, tried to convince us that the appellant/ company was, in fact, running and managing the affairs of Kelvin Jute Co. Ltd. as well as its Mill which was an inseparable unit of Kelvin Jute Co. Ltd. Mr. Das Adhikary urged that the Jute Mill by itself had no identity and in running the Jute Mill the appellant/company was really running the Kelvin Jute Co. Ltd. and must, therefore, be held to be liable and responsible for payment of its outstanding dues.

22. Mr. Das Adhikary submitted that the said position will be clear from the fact that the other dues of Kelvin Jute Co. Ltd., including current provident fund dues, were being paid by the appellant/company.

23. Mr. Das Adhikary lastly submitted that in any event no order could be passed in the appeal having regard to the prayers made in the writ application which, in fact, was pending disposal before the learned Single Judge. Mr. Das Adhikary pointed out that in the writ application the appellant/company had prayed, inter alia, for a direction to credit the sum of Rs. 24,33,854/- to the bank account of the appellant/company since the same had been wrongfully realised from the said account of the appellant No. 1. Mr. Das Adhikary pointed out that till the writ petition was heard and disposed of and a definite finding was arrived at with regard to the appropriation of the aforesaid amount by the Regional Provident

Fund authorities, no orders should be passed in the appeal with regard to the said sums which had already been credited to the account of the Provident Fund Authorities.

24. Having carefully considered the submissions made on behalf of the respective parties and keeping in mind the fact that the Jute Mill of the Kelvin Jute Co. Ltd. is being run and managed on the strength of a scheme formulated by this Court whereby the appellant/company is operating the Mill under the supervision of a Committee of Management constituted by the Court and chaired by a learned senior Advocate of this Court as Special Officer thereof, and having further regard to the directions given by the learned Single Judge while disposing of the writ application filed by the Bengal Chatkal Mazdoor Union and others to the effect that the manner in which the Mill was being managed would continue till the scheme for revival was filed before the BIFR and was considered by it, we are of the view that the prayer as made in the application for appropriate orders may be moulded to suit the circumstances so as to prevent the disruption of the management and running of the business of the Jute Mill by the appellant/ company in terms of the aforesaid scheme as framed by the Court. Such a view is all the more supported by the fact that the various authorities, including the Provident Fund Authorities, had agreed to proceed slowly in realising its outstanding dues and even in waiving damages and interest levied in the proceeding u/s 14B of the 1952 Act. Apart from the above, one has to also take into consideration the fact that about 3000 workers'' families are dependent upon the smooth running of the Jute Mill.

25. Prima facie, it would appear to us that the appellant/company being a different entity from the Kelvin Jute Co. Ltd., it cannot be made liable for the outstanding dues and/or the damages levied against the Kelvin Jute Co. Ltd.

26. In such circumstances, we are inclined to accept the offer made by Mr. Saktinath Mukherjee, learned senior counsel, that his clients were willing to secure the amount levied as damages and to direct the amount already appropriated to be recredited to the account of the appellant No. I/company to enable it to continue its smooth operation of the Jute Mill.

27. We, accordingly, dispose of the appeal and all the connected applications by directing that subject to the furnishing of the Bank guarantee for a sum of Rs. 24,00,000/- from any Nationalised Bank to the satisfaction of the Registrar, Original Side of this Court, the Regional Provident Fund Authorities shall recredit the sum of Rs. 24,33,854/- to the account of the appellant/company in the Citi Bank, Brabourne Road branch, Kolkata, being Account No. 0272836337, within one week from the date on which such Bank guarantee is submitted.

28. This order is being made subject to the final result of the writ application, being W.P. No. 2131 of 2004. We also make it clear that the views expressed by us in this judgment and order are of a prima facie nature and the learned Single Judge will be at liberty to pass such orders as he may consider fit and proper

without being influenced by such views. In order to expedite the hearing of the writ petition we direct that the respondents will be entitled to file their respective affidavits-in-opposition to the writ application within four weeks from date; reply, if any, be filed within two weeks thereafter. The parties will be at liberty thereafter to mention the matter before the learned Single Judge for early disposal.

29. Should the writ application succeed, the appellant/company will be entitled to apply to the learned Single Judge for directions for release of the Bank Guarantee.

30. There will be no order as to costs.

31. The Registrar, Original Side of this Court, the Citi Bank, Brabourne Road branch, Kolkata, and all parties are to act on a xerox signed copy of the operative portion of this judgment and order on the usual undertakings.

Asit Kumar Bisi, J.

32. I agree.

